

The Utah Sentencing Commission, pursuant to its statutory authority and responsibility under Utah Code Ann. § 63-25a-304, promulgates the following 1998 Utah Sentencing and Release Guidelines for adult criminal offenders.

The Utah Sentencing Commission is charged to recommend and coordinate sentencing and release policy for both juvenile and adult offenders within the state of Utah. It consists of twenty-seven members who represent all facets of the justice systems: judges, prosecutors, defense attorneys, legislators, victims, law enforcement, treatment specialists, ethnic minorities, corrections, parole authorities, and others.

### **Philosophy Statement**

The Commission on Criminal and Juvenile Justice developed the 1985 Sentencing and Release Guidelines used for adult offenders in Utah. The guidelines were broadened at that time to guide law enforcement, prosecution, and defense decisions. Although the foundation of the guidelines is sound, they need to be revisited, monitored, and evaluated on a regular basis. One of the primary directions of the Utah Sentencing Commission is to provide this review and the following basic philosophies and goals direct this effort. The goal of the guidelines is to bring more objectivity to the sentencing and release process yet also allow the court or the Board of Pardons and

Parole discretion in considering aggravating and mitigating circumstances. The sentencing and release guidelines provide for consideration of the following factors:

- severity of the offense;
- Utah penal statutes;
- crime history and risk to society;
- prosecutorial, judicial, and parole board discretion; and
- continuum of sanctions.

Sanctions should be proportionate to the severity of the current offense. Guidelines should reflect the culpability of the offender based on the nature of the current offense and the offender's role coupled with the offender's supervision history and overall likelihood to recidivate as inferred by the offender's "Criminal History Assessment." These guidelines reflect these basic concepts of justice. The Criminal History Assessment is comprised of a detailed scoring system which allows evaluation beyond the current offense. Distinctions between person and non-person offenses, broader categories paralleling the degrees within the criminal code, and the criminal history comprise the foundation of the matrices.

The sentencing guidelines matrices include a variety of sentencing options to accommodate a continuum of sanctions such as regular probation, intermediate sanctions, and imprisonment. The number of months or years found in each cell of the revised matrices suggest typical lengths of imprisonment

rather than the minimum lengths found in the 1985 matrix.

Criminal punishment should focus on the particular circumstances of each crime, offender, and victim involved. Guidelines should promote uniformity while, at the same time, afford the sentencing judge and Board of Pardons and Parole the flexibility to fashion a specific sentence to an individual offender. Therefore, aggravating and mitigating circumstances must be factored into the framework of the guidelines. Decision makers are strongly encouraged to abide by the guidelines. Departures from the guidelines may be based upon aggravating or mitigating factors which are strongly encouraged to be articulated on the record. These guidelines are not intended to eliminate but simply structure discretion. To foster uniformity, it is recommended that the Board of Pardons and Parole consider a release date which is consistent with the guidelines as a typical term.

### **Statement of Purpose**

The sentencing of criminal offenders is a complex process with many related decision points. For sentencing purposes, the process starts with the prosecutor's decision regarding the specific charges to be filed and what, if any, plea to negotiate. If the defendant is convicted, the judge typically refers the offender to the Department of Corrections for a presentence investigation. The presentence investigator reviews the background of the offender, documents the nature of the

offense and its impact on the victim, and then makes recommendations to the judge concerning the sentence to be imposed and any conditions associated with that sentence. *See* Utah Code Ann. § 64-13-20. The judge then imposes sentence.

A variety of options are available to the judge including an increasing number of intermediate sanctions. The more severe of all sentencing options involve the Utah State Department of Corrections. Correctional resources are severely overtaxed and there has been concern about policy to help allocate those resources. The guidelines assist decision makers in the appropriate allocation of these limited resources. If the judge sentences the offender to prison, custody of the offender transfers to the Utah Department of Corrections, and jurisdiction and the decision of how long the offender remains under prison custody transfers to the Board of Pardons and Parole.

### **Guidelines as a Tool**

Utah law provides the basis for the sentencing and release of criminal offenders. By sound design these statutes allow significant latitude in decision making. The guidelines are an attempt to further structure decision making relative to sentencing and release, yet still retain the flexibility to deal with atypical cases. The guidelines also provide a means of determining and allocating required resources. Utah's guidelines are intended to maintain

the desirable functions of parole and judicial discretion, and at the same time incorporate a rational criminal justice philosophy, eliminate unwarranted disparity, and provide a tool to match resources with needs.

The guidelines, as structured, provide a forum for discussion regarding sentencing and a common frame of reference on which to base discussion. Equally important, they provide a means to look into the future and assess the demand for resources based on policy changes.

### **Action Research Approach**

The guidelines are not intended to set policy in concrete. The philosophy, functioning, and problems of the criminal justice system fluctuate constantly. The guidelines should be adaptable to change, and should even encourage such change. Through general monitoring of how the guidelines are used, they can be modified to accommodate changes in policy or practice. Certainly the best policy tools provide feedback and are self-correcting. This entire approach is one of the ongoing goals of the Sentencing Commission as it promulgates revised guidelines periodically.

A major instructional effort will accompany the revised guidelines. The Sentencing Commission is developing a lesson plan to orient various participants within the criminal justice system to the revised guidelines. Presentence investigators, in particular, will receive specific

guidance concerning implementation and interpretation.

### **Policy Implicit in the Guidelines**

These guidelines are a cooperative venture. No additional legislation is being proposed to coerce agencies to conform. The effort is to provide a mechanism for communication and improvement of key policy rather than to dictate practice by statute or rule. For the guidelines to function well, several policies are important. The policies need not be implemented exactly as stated, but their intent is critical.

### **Prosecution**

Prosecutors may use the guidelines to determine the implications of charging and plea negotiations. The guidelines are intended to make the system predictable by making explicit the sentence an offender with a given background is likely to receive. This makes charging and plea negotiations even more critical. Prosecutors should make it a policy to explain the effect of charging and plea negotiations in each individual case to the victim.

### **Presentence Investigators**

Presentence investigations should be conducted on all district court felony convictions and class A misdemeanor sex offense convictions. Presentence investigations are beneficial to the Board of Pardons and Parole as well as

for the court and should be completed even when the court may not deem it necessary in a particular case. Presentence investigations should have the guidelines forms attached when they are sent to the sentencing judge, the prosecutor, and the offender in accordance with Utah Code Ann. § 77-18-1 and Utah Code Jud. Admin. Rule 4-203. The recommendations made to the judge should conform to the guidelines unless aggravating or mitigating circumstances are documented in the recommendations and are agreed upon by the presentence investigator and/or staff.

### **Sentencing Judges**

Sentencing judges may require that the guidelines forms be attached to all district court presentence investigations. Judges are encouraged to sentence within the guidelines unless they find aggravating or mitigating circumstances justifying departure. These circumstances should be stated in open court and included on the judgment and commitment order.

In order to assist judges in sentencing, Utah law provides for a possible diagnostic evaluation. “In felony cases where the court is of the opinion imprisonment may be appropriate but desires more detailed information as a basis for determining the sentence to be imposed than has been provided by the presentence report, the court may in its discretion commit a convicted defendant to the custody of the Department of Corrections for a diagnostic

evaluation for a period not exceeding 90 days.” Utah Code Ann. § 76-3-404. Such a referral involves the use of scarce resources and should be reserved for an in depth review and assessment to provide the sentencing judge with the necessary information to make the appropriate sentence. This statutory authority and accompanying resources are intended to enhance the assessment capabilities in sentencing and are not intended to provide shock incarceration for the offender. When seeking to supplement a presentence report with a psychological evaluation, the court may also consider community resources other than the diagnostic unit at the Department of Corrections.

### **Board of Pardons and Parole**

The Board of Pardons and Parole requires an updated guidelines form to be completed on each offender appearing for an original parole grant hearing. In many cases, additional events have occurred between the time of the court’s first sentencing decision and the first appearance before the Board (e.g., new convictions, program successes or failures, escapes, etc.). Except where there are aggravating or mitigating factors, the Board is encouraged to make decisions compatible with the guidelines. A statement of general rationale for Board decisions is provided to the offender and made available to the public.

## **Utah Sentencing and Release Guidelines Instructions and Definitions**

Under the direction of the Utah Sentencing Commission, these 1998 Sentencing and Release Guidelines represent a cooperative effort by all the components of the Utah Criminal Justice System to make a unified statement of policy regarding the sentencing and release of adult criminal offenders. The dominant underlying philosophy of the guidelines is that criminal sentences should be proportionate to the seriousness of the offense for which the offender was convicted. Other major policies are inherent in the guidelines. These are the offender's overall culpability based on the nature of the current offense and the offender's role coupled with the supervision history and likelihood to recidivate, as inferred from the offender's criminal history. Since there are times that aggravating and mitigating circumstances are considerations in sentencing, the guidelines also offer that flexibility. The guidelines provide predictability by communicating a standard in sentencing and releasing. All parts of the system should have a good idea of the disposition and penalty associated with the conviction.

Except for consecutive and concurrent enhancements, all statutory sentencing enhancements are not included in the context of these guidelines. For example, Utah law concerning repeat and habitual sex offenders, Utah Code Ann. § 76-3-407, or gang enhancements, Utah

Code Ann. § 76-3-203.1, are to be considered outside and in addition to these guidelines.

### **Criminal History Assessment - Form 1 Top:**

The purpose of the Criminal History Assessment - Form 1 is to provide a standard frame of reference to reduce or enhance the severity of the sentence based on the prior criminal and supervision history of the offender. When scoring a particular criminal history category, at times it may be possible to identify and allot more than one point level. However, only score the single highest point option with a given category. Do not check multiple scores in a single category and then add them.

## **DEFINITIONS**

### **Prior Adult Felony Convictions**

Do not count the current offense or offenses. Prior felony convictions are limited to adult convictions. Only convictions should be counted. Other instances such as dismissed cases, intelligence information, numerous prior arrests, etc. may be considered in the aggravating and mitigating circumstances section but are not quantified in the guidelines. Where military records are available, court martial information should be included if the charges are criminal in nature.

Utah law defines "single criminal episode" as "all conduct which is closely related in time and is incident to an attempt

or an accomplishment of a single criminal objective.” Utah Code Ann. § 76-1-401. If multiple convictions arise from a single criminal episode, as statutorily defined, only one conviction should be counted.

### **Prior Adult Misdemeanor Convictions**

This item is scored similarly to the one above. Traffic crimes should be excluded with the exception of DUI and reckless driving convictions.

### **Prior Juvenile Adjudications**

This item specifically scores the juvenile record. Only adjudications that would be criminal convictions if committed by an adult should be counted. Such adjudications should be calculated in the same manner as generally explained in the Prior Adult Felony Convictions and Prior Adult Misdemeanor Convictions categories. Only those cases that resulted in a finding of delinquency should count. In other words, some adjudication of guilt in the juvenile system must be found before points are allotted here. Care must be exercised since not every entry on a juvenile record represents an adjudication.

For purposes of calculating in this category, three misdemeanor offenses equal one felony. Do not “round up” in these cases, i.e., less than 3 misdemeanors = 0 felonies; 3 - 5 misdemeanors = 1 felony; 6 - 8 misdemeanors = 2 felonies, etc. Status offenses are offenses that would not be illegal if committed by an adult, e.g., truancy or smoking. Do not count status offenses.

### **Supervision History**

This item encompasses both juvenile and adult history. Only post-adjudication or post-conviction supervision should be counted. Pre-trial detention or jail, for example, would not constitute supervision history for these purposes. The term “revocation” includes situations where findings of fact hearings have demonstrated that the conditions of supervision had been violated, but the judge or Board of Pardons and Parole chose to continue supervision without revocation. The item entitled “act occurred while under current supervision or pretrial release” refers to the situation at the time the offense occurred. For points to be assigned in this Supervision History category, both the prior and present offenses should be criminal in nature. Traffic violations and status offenses for juveniles certified to the adult system should not be counted.

### **Supervision Risk**

This item penalizes those who have absconded or escaped from court ordered supervision in the past, as either a juvenile or an adult. The more restrictive the supervision, the greater the penalty. Those who “fail to report” for court, presentence investigation, or supervision, receive one point. “Absconding” is when an offender “leaves a facility without permission; or fails to return at a prescribed time.” If an offender is under supervision, absconding occurs “when he willfully changes the residence that he reported as his correct address without notifying his parole officer or obtaining permission.” Utah Code § 76-8-309.5. Escape and absconding

convictions only should be counted. The exception to this conviction requirement is when an offender could have been charged with escape or absconding but was, instead, charged or convicted of another crime while on escape or absconding status. Absconding receives two points if the placement is non-residential and three points if the supervision is residential in nature.

“A prisoner is guilty of escape if he leaves official custody without authorization.” Utah Code § 76-8-309(1). If the offender “escapes” from a secure (locked door or secure perimeter) confinement setting, four points are allotted.

### **Violence History**

This category is intended to document any violence that may have accompanied any prior criminal offense(s). Only count prior convictions. The guidelines contain a graduated scale of points to be allotted depending upon the past violent offense. One point is allotted for a misdemeanor, two points for a third degree felony, three points for a second degree felony, and four points for a first degree felony as indicated on Forms 1 and 2. Other incidents of documented violence that are not convictions in and of themselves may be considered under Form 4 Aggravating and Mitigating Circumstances.

### **Weapons Use in Current Offense**

In addition to the violence history category of the criminal history assessment, the guidelines emphasize the use of a

weapon *in the current offense(s)* as a factor, in and of itself, that may increase the criminal history score. Do not consider this category for any prior convictions as is the case in all other criminal history categories. This category is also to be considered only when the current conviction, itself, does not reflect the use of the weapon or when there is no statutory weapons enhancement involved. (See, e.g., Utah Code Ann. § 76-3-203.2) For example, if it is apparent that the offender was convicted of first degree felony aggravated robbery instead of second degree robbery because of the use of a weapon, do not additionally consider this category. Likewise, if an offender receives a statutory weapons enhancement, do not additionally consider this category.

The point allocation in this category depends upon the use of the weapon: *Constructive Possession*, for purposes of the guidelines, occurs when the offender has access to the weapon but it is not on his or her person. For example, there was a firearm in the glove compartment or a knife in a gym bag in the vicinity. One point is allotted for constructive possession. *Actual Possession*, for purposes of the guidelines, occurs when the offender has the weapon on his or her person. For example, a handgun in a pocket. Two points are allotted for actual possession. *Weapon displayed or brandished* results in three points being allotted. *Weapon actually used* results in four points being allotted. This occurs, for example, when an offender points or fires a gun, uses a knife in close proximity to the victim, or swings a baseball bat. *Weapon*

*used and injury caused* results in six points being allotted, regardless of the seriousness of the injury. (Again, consider this entire category only if the conviction, itself, does not reflect the weapons use or when no weapons enhancement is being considered.)

As mentioned, this category is the only occasion when the current conviction is considered in the criminal history portion of the guidelines. Otherwise, current convictions are considered only in determining the appropriate column of the matrix or in aggravating and mitigating factors. Admittedly, considering the current conviction in the criminal history assessment creates an anomaly to the guidelines. However, the Sentencing Commission considers the use of a weapon to be such a significant factor in determining both placement and release decisions in sentencing, it is provided for specifically in the guidelines in this manner.

### **Total Placement Score**

To arrive at this score, add up the points associated with the Criminal History Assessment thus far in the procedure.

### **Criminal History Category**

Using the Total Placement Score, identify the appropriate criminal history row: I, II, III, IV, or V.

### **General Disposition Matrix - Form 1 Bottom**

The vertical axis of this matrix is comprised of the criminal history rows. The horizontal axis represents crime category columns which are categorized on relevant dimensions of the Utah penal code. The various levels of shading in the matrix represent suggested dispositions (disregarding aggravating and mitigating circumstances).

The crime category axis *generally* flows from left to right indicating the most severe sanction to the least severe sanction of the particular matrix. However, this axis does not necessarily indicate which crimes are more severe than others. Although normally the case, do not always assume that simply because a particular column is to the left of another, that the column represents a more severe crime (as was the case with the previous guidelines). As you can tell, some cells recommend a more severe placement than the cell immediately to its right (e.g. prison vs. intermediate sanction), but the length of stay may actually be shorter than the cell immediately to the right.

If there are multiple current offenses, refer to the *Crime Column Listing (by severity)* which includes all 19 categories from both matrices in order of severity. Addendum A. From this listing, determine which column should be used as the most severe offense. This list determines which is the most serious offense in the case of multiple current offenses, not the particular matrix itself. This listing will also be needed when current



offenses include both sex offenses and non-sex offenses.

To determine the suggested disposition, locate the proper column of crime category based on the most serious offense for which the offender is currently convicted. (Again, if there is any question, refer to the listing.) In addition, specific crimes are listed by crime category, *death*, *person*, or *other*, in Addendum B. Then locate the square where the appropriate level of crime category column intersects with the criminal history row that was determined through the Criminal History Assessment. The level of shading in that box identifies the suggested or mandatory sentencing disposition. Split cells containing dual shading indicate the guidelines recommend either placement.

Under Utah law, murder has been placed on a list of offenses that mandate imprisonment. Utah Code Ann. § 76-3-406. Regardless of the criminal history level, under the murder column of the matrix, the offender must be imprisoned. Capital offenses are not covered by the guidelines.

### **Time Enumerated within Individual Cells**

The length of time enumerated within each cell is used to calculate the typical length of stay if the offender is imprisoned. These times are not meant for calculating time on any particular intermediate sanction or on regular probation. If there is only one active sentence, the typical guideline term is determined by simply identifying the cell where the appro-

priate crime column intersects with the criminal history row. The times located within cells found in the mandatory imprisonment shaded area are not mandatory minimums.

Again, if there are multiple current offenses, refer to the *Crime Column Listing (by severity)* to determine which column should be used as the most severe offense. Addendum A. This must be the same column as used when calculating the disposition (as explained above). This crime column should be intersected with the appropriate row of criminal history.

### **Consecutive or concurrent**

Other felony sentences should be examined to determine if they are consecutive or concurrent. “Sentences for state [felony] offenses shall run concurrently unless the court states in the sentence that they shall run consecutively.” Utah Code Ann. § 76-3-401(1). The following non-exhaustive list of aggravating circumstances suggests consideration of consecutive sentences:

- escape or abscond
- under supervision or bail release when offense was committed
- unusual victim vulnerability
- injury to person or property loss was extreme for crime category
- offense characterized by extreme cruelty or depravity.

Although subsequent offenses generally run concurrently, “[t]he court

shall order that sentences for state offenses run consecutively if the later offense is committed while the defendant is imprisoned or on parole unless the court finds and states on the record that consecutive sentencing would be inappropriate.” Utah Code Ann. § 76-3-401(2).

If multiple convictions are ordered to run concurrently, the guidelines add 10% of the recommended length of stay of the shorter sentence to the full recommended length of the longer sentence. For example, consider an offender convicted of aggravated robbery with a recommended length of stay of 7 years (84 months) and also convicted of aggravated assault with a recommendation of 20 months. If the court orders the sentences to run concurrently, the guidelines recommend a length of stay of 86 months (10% of 20 mos = 2 mos + 84 mos = 86 mos). If multiple convictions are ordered to run consecutively, the guidelines add 40% of the recommended length of stay of the shorter sentence to the full recommended length of the longer sentence. Using the same example above, if the sentences were consecutive, the guidelines would recommend a length of stay of 92 months (40% of 20 mos = 8 mos + 84 mos = 92 mos). This same approach applies even if there are three or more sentences being considered.

For another example, consider an offender convicted of robbery and sentenced to prison with a guidelines recommendation of 48 months. The offender is paroled after 36 months and, while on parole, commits aggravated burglary and is

sentenced to prison with a guidelines recommendation of nine years. If the judge orders the sentences to run consecutively, the new guidelines recommended sentence is 9 ½ years (40% of 12 mos (which is the time remaining on the original sentence) = 4.8 mos + nine years = approximately 9 ½ years).

If there are a string of multiple offenses that are running consecutively or concurrently, add the applicable percentage of all of the shorter sentences to the longest sentence. For example, consider an offender convicted of 1) aggravated assault with a recommendation of 24 months, 2) a drug offense with a recommendation of 20 months, and 3) forgery with a recommendation of 10 months. If the judge orders the sentences to run concurrently, add 10% of both the drug offense and forgery to the 24 months from the aggravated assault. The guideline recommendation would total 27 months (10% of 20 mos = 2 mos; 10% of 10 mos = 1 mos; 2 mos + 1 mos = 3 mos; 3 mos + 24 mos = 27 mos).

Occasionally, the “longer” sentence may not be from the most “severe” offense as indicated by the *Crime Column Listing (by severity)* as explained above. In these exceptional cases, treat the most severe offense as you would the “longest” sentence for purposes of calculating concurrent and consecutive sentences. This is done to preserve consistency in guidelines application.

All guidelines considerations of concurrent and consecutive sentencing

should be consistent with the limitations in Utah Code Ann. § 76-3-401.

### **Conditions of Intermediate Sanctions and Regular Probation**

While intermediate sanctions are defined as any sanction between regular probation and prison, in Utah, the courts sometimes attach *special* conditions to a probationary sentence which makes the sentence more than regular probation. For the purpose of the guidelines, typical conditions of probation often include payment of restitution, attendance in counseling, drug testing, search and seizure clauses, community service, etc. These conditions ordinarily do not rise to the level of being *special*, and therefore do not transform regular probation into an intermediate sanction. Intermediate sanctions need to be defined a little further in this state.

The concept of intermediate sanctions is that the higher the risk an offender poses in the community, the more controls are placed on the offender. These controls translate into various programs which are considered intermediate sanctions. They include such programs as electronic monitoring, referral to the day reporting centers, participation in residential treatment programming, intensive supervision, etc. These are the *special* conditions referred to above. These programs always have increased levels of supervision. In addition, because of the increased supervision, these sanctions are more costly than regular supervision. As such, these intermediate sanctions should

be viewed from the perspective that because they are limited, those offenders who need them should be carefully selected by the judge in conjunction with the Department of Corrections.

It is important to note that the higher the risk an offender presents in the community, the more intermediate sanctions an offender may access. For instance, an offender may be on intensive supervision and electronic monitoring and also be attending the day reporting center. Obviously, because of the cost of these programs, it is important that all the services accessed are necessary. Therefore, the separation of regular probation and intermediate sanctions has to do with cost and level of supervision as indicated by the *special* conditions attached. There is no bright line between regular probation and intermediate sanctions and this fact ought to be considered in sentencing.

### **Sex Offender Guidelines - Form 2**

These are the sentencing and release guidelines to be used for all sex offenders. Specifically, offenses to be considered under this portion of the guidelines are the same ones that are required to be registered under Utah Code Ann. § 77-27-21.5(1)(e) plus *gross lewdness*, § 76-9-702, and aggravated kidnapping with a sex offense, § 76-5-302(1)(b)(v). The Criminal History Assessment is only slightly different than that used under Form 1 for all other offenders. Two additional categories exist on the Criminal History Assessment for

sex offenders: Number of Prior Victims and Time Range. Other than these two additional categories, the Criminal History Assessment for sex offenders should be scored identically to Form 1.

In an extensive study on mandatory minimum sentences for sex offenders, the Sentencing Commission found, among other things, that sex offenders were quite different than other offenders. *See Utah Sentencing Commission Annual Report 1995-1996*; Utah Statistical Analysis Center, *Analysis of Utah's Child Kidnaping and Sexual Abuse Act of 1983*. Mandatory imprisonment, lifetime parole, treatment resources, and the separate guidelines matrix resulted from this study. Form 2 reflects the amended laws mandating imprisonment for certain sex offenders in conjunction with differing indeterminate lengths of stay ranges. In addition, there are only three criminal history rows on the sex offender matrix compared to five on the general matrix. This provides the Board of Pardons and Parole with more discretion concerning sex offenders.

The criminal histories of sex offenders were often not closely related to their likelihood to commit additional offenses. The factors related to this likelihood are specific to a history of sexual deviancy and situations resulting in sexual arousal. The added categories of Number of Prior Victims and Time Range are designed to address this concern.

### **Number of Prior Victims**

This category documents whether the offender had multiple victims involved in any sex offense convictions not including the present offense. Zero points are allotted for no prior victims, three points allotted for one prior victim, and four points for more than one prior victim in any of these prior sex offense convictions. This victimization does not have to arise out of a single criminal episode. However, before any points are allotted under this section, there must be a specific conviction involving the victim or victims counted.

### **Time Range**

This category quantifies the length of time the offender has been offending sexually. If the offender has any sex offense conviction over two years old, four points are allotted. Three points are allotted if the offender has any sex offense conviction within the past range of over one year to two years, two points for any conviction within the last year excluding the present offense, and one point for the present offense. The date of conviction is determinative for purposes of this section.

The sex offender matrix itself on Form 2 is obviously different than the Form 1 matrix. However, they both function similarly. Simply identify the appropriate crime category column and intersect it with the appropriate criminal history row to determine the suggested or mandatory disposition. Specific sex offenses are listed by crime category in Addendum B.

Certain sex offenses, similar to murder, mandate imprisonment regardless of the criminal history score. In rare cases, Utah law does allow for an alternative sentence to prison even under these mandatory imprisonment sex offenses. However, an arduous list of circumstances must be met before such a deviation is allowed. These circumstances are enumerated under Utah Code Ann. § 76-5-406.5. As on Form 1, split cells with dual shading indicate the guidelines recommend either placement.

### **Mandatory Imprisonment Sentence Aggravating and Mitigating Circumstances - Form 3:**

As mentioned, certain sex offenses mandate imprisonment. Utah Code Ann. § 76-3-406. For all but one of these offenses, three alternative minimum terms may be imposed. “[T]he court shall order imposition of the term of middle severity unless there are circumstances in aggravation or mitigation of the crime.” Utah Code Ann. § 76-3-201(6)(a). Examples of these circumstances are listed in Form 3 and are not exclusive. Accordingly, Form 3 is to only be used with certain sex offenses and therefore only with Form 2 (guidelines for sex offenders).

### **Aggravating and Mitigating Circumstances - Form 4**

There are occasionally circumstances that compel deviation from the guidelines. Some of the more common reasons are listed for convenience on Form 4. Other reasons, as they occur, can be specified. Reasons should always be

specified when the guideline sentence is not recommended. These aggravating and mitigating circumstances should be considered for both Form 1 (general guidelines) and Form 2 (guidelines for sex offenders).

In considering all aggravating and mitigating factors in a particular case, the number of each should not merely be added up or otherwise mechanically applied in the balancing process. Rather, the totality of the mitigating factors should be compared against the totality of the aggravating factors. Any one mitigating factor, standing alone, could outweigh some or all of the aggravating circumstances in the case. On the other hand, one aggravating factor, standing alone, could outweigh some or all of the mitigating factors in the case. The guidelines are concerned with the respective substance and persuasiveness of the competing factors, not their relative numbers. Also, do not list an aggravating factor in either form if it is already an element of the offense.

Aggravating factor #2 on Form 4 states “Multiple documented incidents of violence not resulting in conviction.” In order for these “documented incidents of violence” to be counted, there must exist a court approved stipulation that such incidents will be considered. The intent of this requirement, along with having a certain standard of verification, is to assure that all are aware at the time of conviction that such documented incidents will be counted on the guidelines and considered in both the sentencing and release decisions.

### **Days of Credit**

Time incarcerated under the following circumstances should be counted as time served against the maximum sentence: 1) time in jail for the offenses of commitment (except for time served as a condition of probation); 2) time in secure custody for completion of a court ordered diagnostic evaluation; and 3) time in the Utah State Hospital pursuant to a guilty and mentally ill conviction. Utah Admin. R671-205-1. No credit is given for time spent in custody at the Utah State Hospital or comparable non-prison psychiatric facility while the offender is judicially declared incompetent.

### **Guideline Matrix Recommendation**

The guideline sentence without regard to aggravating or mitigating circumstances should be documented here.

### **AP&P Recommendation**

The recommendation of Adult Probation and Parole should be documented here.

### **Reason for Departure**

Any reasons for departure should be documented by the presentence investigator in every case in which the guideline recommendation is not followed.

